No. 75-559

In the Supreme Court of the United States

OCTOBER TERM, 1975

BASIL VESPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The opinions of the district court are reported at 389 F.Supp. 1359 (Pet. App. 8a-44a) and 383 F. Supp. 339 (Pet. App. 45a-48a). The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 520 F.2d 1369.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1975. A timely petition for re-

hearing was denied on September 11, 1975. The petition for a writ of certiorari was filed on October 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether statements of a co-conspirator who died prior to trial were properly admitted.
2. Whether the government proved every essential element of the offense beyond a reasonable doubt.
3. Whether the trial court properly instructed the jury.

STATEMENT

Following a jury trial in the United States District Court for the District of Delaware, petitioner was convicted of violating the Travel Act (18 U.S.C. 1952) and 18 U.S.C. 371, by conspiring to travel in interstate commerce and use interstate facilities to commit extortion in violation of 11 Delaware Code 846(1) and (2) (1975). He was sentenced to four years' imprisonment, all but six months of which was suspended in favor of probation, and was fined $5,000.

The facts are set forth in some detail in the district court's opinion denying petitioner's motion for a judgment of acquittal or a new trial (Pet. App. 8a-44a). The evidence showed that petitioner engaged Albert Shaffer, Jr.,[1] to help him obtain money from Joseph Remedio, and that in attempting to ob-

[1] Shaffer was indicted with petitioner but died prior to trial (Pet. App. 8a-9a).

tain the money Shaffer used methods that violated Delaware law.

Petitioner was a concrete subcontractor with whom Remedio established a business relationship. A dispute arose over petitioner's performance; each party claimed that he was owed money by the other and civil litigation was commenced in a New Jersey state court (Pet. App. 11a).

On July 3, 1974, Remedio found two messages at his office to call Shaffer, whom he did not know. When Remedio told Shaffer the next day that he would not discuss the Vespe dispute, Shaffer stated that he would come to Remedio's office on Monday or Tuesday and that if Remedio was not there he could get a bullet in his head (Pet. App. 12a). Remedio, who had been threatened about the Vespe dispute the previous September by other individuals (Pet. App. 11a-12a), called Terrence Patton, a Wilmington police detective, and told him about the threats.

On July 10 Shaffer told Remedio to expect a visit shortly. Remedio called Patton, who (with another officer) immediately went to Remedio's office.[2] Remedio introduced the officers to Shaffer as business associates (Pet. App. 12a-13a). Shaffer stated that he was authorized to collect petitioner's accounts receivable. Remedio again disclaimed any debt to

[2] Shaffer was already at Remedio's office when the officers arrived. Patton noticed a limousine parked outside and copied the license number. The other officer testified that the limousine looked like the same limousine which petitioner later used to visit Remedio (Pet. App. 14a).

petitioner, and Shaffer said that he would contact the attorneys handling the litigation (Pet. App. 13a).

Approximately forty minutes after this meeting Shaffer called Remedio and castigated him for having police officers present. Shaffer demanded that Remedio pay $10,000 a week to the Vespe Contracting Company until $80,000 had been paid. Shaffer threatened Remedio and his family with bodily harm and death if the payments were not forthcoming (Pet. App. 14a-15a).

Patton subsequently advised Remedio that Shaffer was known to be a very violent man. Remedio agreed to cooperate in a federal investigation, and the Federal Bureau of Investigation installed monitoring devices on his telephone and in his office (Pet. App. 15a).

Between July 12 and July 22 five conversations between Remedio and Shaffer, Remedio and petitioner, and, in one instance, among all three men, were recorded. The pattern of these conversations was that Shaffer would demand money from Remedio, threatening him and telling him that the matter was out of petitioner's hands, while petitioner would disclaim any resort to violence. Petitioner admitted to Remedio that Shaffer was authorized to collect debts on his behalf and repeatedly told Remedio of Shaffer's reputation as a violent man who often had been accused of murder. At one point petitioner offered Remedio a "hypothetical" situation, stating that if he were a contractor who was told by a mob-controlled company that he owed it money and

that his alternatives were to pay or be shot, he would pay. Finally, in one telephone conversation between Remedio and Shaffer, in which Shaffer was talking from a phone in petitioner's office, petitioner got on the line and told Remedio that the collection matter had been turned over to Shaffer (Pet. App. 16a-21a).

Following his arrest petitioner told federal agents that he had known Shaffer for some years and that Shaffer was authorized to collect debts on his behalf (Pet. App. 21a-22a).

After setting forth the evidence produced at trial, the district court stated (Pet. App. 23a):

> The interplay between Shaffer, the heavy-handed "gorilla" and "bad hombre" * * * and [petitioner], the reasonable man who disliked violence, upon Remedio's will and nerves was too highly attuned and orchestrated both in timing and content of conversations not to have been agreed upon in advance. [Petitioner] played upon Remedio's fear of Shaffer and reinforced it in every conversation. The enmeshing of the actions and conversations of Shaffer and Vespe with Remedio could have occurred only through full discussion and close cooperation between them in proceeding upon an overall scheme and plan to force Remedio to pay a substantial sum of money on a highly disputed claim which [petitioner] did not believe was legally collectable through pending court litigation.

ARGUMENT

1. The tape recordings of the conversations with Remedio were played in court, and Remedio testified concerning certain unrecorded conversations he had with Shaffer. Petitioner contends that Remedio's testimony should have been excluded because: (a) it is hearsay and the district court did not require sufficient nonhearsay proof of petitioner's participation in the conspiracy; (b) the district court's instructions to the jury regarding the admission of these statements were erroneous; and (c) Shaffer's unavailability as a witness (due to his death prior to trial) denied petitioner his Sixth Amendment right of confrontation. As the detailed factual presentation of petitioner demonstrates, these arguments require only the application of settled principles to the facts of this case. Accordingly, there is no reason for further review.

a. As petitioner observes, the hearsay statements of one conspirator cannot be considered against another until the latter's connection with the conspiracy has been established through adequate nonhearsay evidence. Hearsay statements may be admitted prior to the establishment of a particular defendant's participation in the conspiracy subject to later proof of the conspiracy's existence and the defendant's participation. The order of proof is a matter within the trial court's discretion. *United States* v. *Martinez*, 481 F.2d 214, 220-221 and n. 16 (C.A. 5), certiorari denied, 415 U.S. 931; *Esco Corporation* v. *United*

States, 340 F.2d 1000, 1009 (C.A. 9); *United States* v. *Sansone*, 231 F.2d 887, 893 (C.A. 2), certiorari denied, 351 U.S. 987.

In the present case, evidence of Shaffer's statements to Remedio was received subject to subsequent independent proof of petitioner's participation in the conspiracy, and the jury was instructed of the provisional nature of the admission of this evidence (Pet. App. 25a-27a).

Independent evidence of petitioner's participation in a conspiracy with Shaffer was introduced. In addition to petitioner's own recorded statements to Remedio indicating that Shaffer was authorized to collect debts for petitioner, that petitioner was aware of Shaffer's violent nature, and that "the matter would not be settled in the courts," petitioner also told federal agents that Shaffer was authorized to collect debts owed him (Tr. 38-40). Telephone toll records showed calls being made from petitioner's telephone at the times in which conversations between Remedio and Shaffer occurred on July 12, 15, and 22, 1974 (Gov't. Exh. 3; Tr. 53-54). This evidence was sufficient under the most exacting standards to allow the jury to consider any hearsay evidence that may have been contained in Remedio's testimony.

Indeed, most of Remedio's testimony was not hearsay at all, for it simply related the threats made to him by Shaffer. These threats were not statements "offered in evidence to prove the truth of the matter

asserted" (Fed. R. Evid. 801(c)) but were, as petitioner admits, "the crime itself" (Pet. 25). They therefore were admissible without respect to the hearsay rules. Petitioner was entitled to contend, and did contend, that Shaffer was not authorized to make the threats on his behalf. But the jury found otherwise, and the threats themselves were not excludable on hearsay grounds.

b. During trial petitioner's counsel objected to the admission of Shaffer's statements. The district court allowed the prosecution to introduce this evidence subject to connection and instructed the jury as follows (Tr. 121-122; Pet. App. 2a-3a, 27a):

> Now, members of the jury: This is a conspiracy case and what has just been testified to is an alleged statement by a co-conspirator, Shaffer. You may not take into consideration—I have permitted this evidence to be admitted, subject to being stricken later if it is not proven by the Government that there was a conspiracy that existed between Mr. Vespe and Mr. Shaffer. If there was a conspiracy and that is proven by independent evidence, aside from any declarations made by Shaffer, then you may consider that evidence. But you cannot consider the evidence until the Government has proven that there was actually a conspiracy between Shaffer and Vespe, because a declaration of Shaffer could not be held against Vespe under the rules of evidence in a court of law in the United States.
>
> So I have admitted this evidence as to the declarations by Shaffer subject to the Government's proof that there was a conspiracy in existence between Shaffer and Vespe.
>
> All right. With that warning, keep in mind what this evidence is.

Petitioner contends that this instruction was confusing and that it led the jury to believe that the court's failure subsequently to strike the hearsay evidence must necessarily have indicated the court's belief that a conspiracy had been proven beyond a reasonable doubt. But petitioner failed to object to this instruction at trial. There was no error here, let alone "plain error."

The court of appeals correctly held that this instruction—when read as a whole, as it must be (*United States* v. *Park*, 421 U.S. 658, 674)—could not have misled the jury (Pet. App. 3a):

> If the second sentence [of the instruction] stood alone, we would have to agree that it improperly usurped the jury's function in determining whether [petitioner] and Shaffer had conspired. However, the offending sentence was embedded in a long trial in which the instructions to the jury, when read as a whole, on the co-conspirator rule were not only consistent with due process but were actually favorable to the accused. The remainder of the precautionary instruction quoted above, in particular, suggests that the Government must prove *to the jury* that a conspiracy existed between [petitioner] and Shaffer before they may consider Shaffer's hearsay declarations as evidence against [petitioner]. [Emphasis in original.]

Moreover, as the court of appeals observed (Pet. App. 3a-5a), the district court's instructions at the conclusion of the trial (which were not objected to by petitioner) sufficiently apprised the jury that it was required to find that petitioner was a member of the conspiracy before it could consider Shaffer's statements against him. In fact, the instructions were more favorable to petitioner than that to which he was entitled: the court instructed the jury that it must find beyond a reasonable doubt that petitioner and Shaffer conspired before it could consider Shaffer's statements against petitioner (Pet. App. 4a-5a). This required the government to meet its entire burden without regard to any hearsay evidence.[3]

[3] There is at least a verbal conflict among the circuits concerning the quantum of nonhearsay evidence that must be introduced before the jury is permitted to consider hearsay evidence. Compare *United States* v. *Geaney*, 417 F.2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028 (hearsay may be considered if the "fair preponderance" of the nonhearsay evidence implicates an individual in a conspiracy); *United States* v. *Wiley*, 519 F.2d 1348, 1350-1351 (C.A. 2) (adhering to *Geaney*); and *United States* v. *Bey*, 437 F.2d 188 (C.A. 3) (following *Geaney*) with *United States* v. *Johnson*, 467 F.2d 804, 807 (C.A. 1), certiorari denied, 410 U.S. 909; *United States* v. *Morton*, 483 F.2d 573, 576 (C.A. 8); and *Rizzo* v. *United States*, 304 F.2d 810, 826 (C.A. 8). The latter cases hold that the nonhearsay evidence of participation in a conspiracy must by itself be sufficient to allow the case to go to a jury before hearsay may be considered against a defendant. Other circuits are internally divided. In light of the instructions to the jury in this case, it is unnecessary for the Court to decide here whether this verbal conflict produces divergent results in sufficient cases to require its resolution.

c. Petitioner contends that the admission of Remedio's testimony concerning conversations with Shaffer deprived him of his ability to confront his accusers. But petitioner had the opportunity to confront Remedio, and it was Remedio—who, petitioner asserts, was free to "exaggerate, embellish and 'gild the lily' with no restraint" (Pet. 23)—who was petitioner's accuser here. Petitioner had ample opportunity to cross-examine Remedio and to challenge his memory and veracity.

Of course, if Shaffer had lived he might have contradicted Remedio's story. But this does not create a Sixth Amendment problem. See *United States* v. *Weber*, 437 F.2d 327 (C.A. 3), certiorari denied, 402 U.S. 932, which analyzed a similar claim. Indeed, in *Delaney* v. *United States*, 263 U.S. 586, 590, this Court held that the Confrontation Clause of the Sixth Amendment does not prevent the introduction of extra-judicial statements made by a dead co-conspirator. To the extent the test of *Dutton* v. *Evans*, 400 U.S. 74, applies to threats and other statements of the sort involved here, they were admissible under that test because Shaffer's statements were against his penal interest. See also Fed. R. Evid. 804(b)(3).

2. Contrary to petitioner's assertion (Pet. 27-32), the government was not required to prove beyond a reasonable doubt the nonexistence of a debt from Remedio to petitioner.[4] 11 Delaware Code 846 de-

[4] This issue was not raised below and there is no reason why it should be considered by this Court. See *Adickes* v.

fines extortion as "compel[ling] or induc[ing] another person to deliver property" through, among other things, the use of threats of physical injury or damage to property. It is not an essential element of the offense that there is no claim of right to the property by the person committing the extortion.[5] Rather, Delaware provides for an affirmative defense based upon a good faith claim of right "to do substantially what he did *in the manner in which it was done*" (11 Delaware Code 847(a) (emphasis added)).

Even if Remedio owed money to petitioner, petitioner has asserted no good faith claim of right to collect it by threatening Remedio with death or injury. Requiring a defendant to make such an affirmative defense does not unconstitutionally shift the burden of proof. Cf. *United States* v. *Hodges*, 493 F.2d 11, 12 (C.A. 5); *United States* v. *Chodor*, 479 F.2d 661, 663-664 (C.A. 1), certiorari denied, 414 U.S. 912; *United States* v. *Rodrigues*, 433 F.2d 760, 761 (C.A. 1), certiorari denied, 401 U.S. 943.[6]

S. H. Kress & Co., 398 U.S. 144, 147, n. 2; *United States* v. *Ortiz*, No. 73-2050, decided June 30, 1975, slip op. 7.

[5] The "intent" referred to in 11 Delaware Code 841 is the intent to deprive the victim of the property, not, as petitioner suggests (Pet. 27-28), the belief of the actor in the victim's right to the property.

[6] *Mullaney* v. *Wilbur*, 421 U.S. 684, does not affect this analysis. Here the government proved beyond a reasonable doubt the elements of the offense. The ultimate burden remains on the prosecution. And lack of a good faith claim of right (unlike state of mind in a homicide case) has not been

3. Petitioner finally asserts that the court's instruction regarding 11 Delaware Code 846 was "plain error."[7] The district court indicated that the property extorted from Remedio would have had to have been "his property," whereas the statute refers only to "property." Petitioner argues that this instruction precluded the affirmative defense set forth in 11 Delaware Code 847.

Petitioner's claim of prejudice in this regard is not supported by the record. Petitioner argued at trial that the alleged debt owed him excused him from criminal liability. Petitioner testified at length regarding his business dealings with Remedio and his belief that Remedio owed him large sums of money for work done (Tr. 325-485). Defense counsel's summation to the jury argued the affirmative defense (Tr. 723-727). Defense counsel requested an instruction on the affirmative defense, which the court gave (Tr. 752).

Moreover, there is no support for petitioner's claim (Pet. 37) that, had he known that the government was required to prove Remedio's interest in the property extorted, he would have presented evidence that the property belonged to a third person. Under 11 Delaware Code 846 the fact that the property extorted may have belonged to a third person (that

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"almost from the inception of the common law of [the crime], the single most important factor in determining the degree of culpability attaching" (421 U.S. at 696) to extortion.

[7] Petitioner did not object to this instruction at trial. See Fed. R. Crim. P. 30.

is, to neither the victim nor the extortionist) is irrelevant. Indeed, given the effect of this instruction as interpreted by petitioner, the government was presented with a greater burden of proof than is required under Delaware law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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